FROZEN FRUIT

18783. Adulteration of frozen strawberries. U. S. v. 1,000 Cans * * *. Order for dismissal of libel reversed on appeal. Decree of condemnation and destruction. (F. D. C. No. 29225. Sample No. 54633–K.)

LIBEL FILED: May 17, 1950, Southern District of Mississippi; amendment to libel filed October 20, 1950.

ALLEGED SHIPMENT: Between April 24 and May 2, 1950, by Allbrook Freezing & Cold Storage, Inc., from Ponchatoula, La.

PRODUCT: 1,000 30-pound cans of frozen strawberries at Gulfport, Miss. When the product was shipped in interstate commerce, it consisted in part of flats of strawberries. After its receipt at Gulfport, Miss., the product was packed into cans, each can containing approximately 30 pounds of strawberries and added sugar.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance by reason of the presence of moldy and rotten berries.

DISPOSITION: Allbrook Freezing & Cold Storage, Inc., claimant, having denied certain allegations of the libel, and both the claimant and the Government having filed interrogatories which were answered, the case came on for hearing before the court on the claimant's motion for dismissal of the libel.

On December 20, 1950, the court handed down its findings of fact and conclusions of law, and in accordance therewith an order was entered on the same day, sustaining the claimant's motion for dismissal and providing for the dismissal of the libel and the release of the product. On December 30, 1950, upon motion of the Government, an order was entered staying the execution of the order of December 20, pending appeal by the Government. Thereafter, the case was appealed to the United States Court of Appeals for the Fifth Circuit, and on March 4, 1952, after consideration of the briefs and arguments of counsel, the following opinion was handed down:

HUTCHESON, *Chief Judge:* "Alleging that they consisted, in whole or in part, of a decomposed and filthy substance, moldy and rotten berries which had been shipped in interstate commerce from Ponchatoula, Louisiana, to Gulfport, Mississippi, and there packaged with sugar added, the amended libel sought the seizure and condemnation, under the Federal Food and Drug Act,[1] of the 1000 cans, more or less, in which they were packed, as an adulterated article of food.

"Intervening as claimant, Allbrook Freezing & Cold Storage, Inc., denied that the product seized was adulterated. Denying also that the seized cans were, or had been shipped, in interstate commerce, and insisting that, since they had not been, they were not subject to seizure and condemnation under the act, and the court was without jurisdiction of the libel, they moved that the libel be dismissed and the seized property released.

"Thereafter, interrogatories having been answered, the motion to dismiss was heard and sustained for the reasons briefly stated by the judge in his

[1] 21 U. S. C. 334 (a) et seq.

letter to counsel,[2] and elaborated in his findings of fact[3] and conclusions of law,[4] and the libel was dismissed.

"Appealing from that dismissal order, libelant is here seeking its reversal. Attacking as untenable the reasons given by the district judge for dismissing the libel: (1) that, since Sec. 341 [401] of the act provides that no definition or quality of fresh fruits shall be established, shipments of fresh strawberries, even if adulterated, are not subject to condemnation and seizure; and (2) that, since the frozen and canned strawberries have not been introduced into commerce, their seizure is premature; appellant insists that the order dismissing the libel was erroneous and must be reversed.

"We agree. In *Bruce's Juices* v. *United States*, . . . F (2) . . ., (this day decided), we rejected a contention as to Sec. 341 [401], quite similar to that advanced below in support of the decision to dismiss. For the reasons, and upon the authorities there cited, we reject the contention made here.

"Nor do we find any better taken the second ground for dismissing the libel, that the strawberries after being processed ceased to be the strawberries which moved in interstate commerce and became a new product which cannot be seized unless and until it moves in interstate commerce in its changed form. If this were a sound view, and adulterated constituents of processed products could be seized only when in their unprocessed form, the enforcement of the act would be easily defeated. That it is not sound, a reading of the act, which contains no such limitation, makes clear. It is made clear, too, by the many cases, some of which are cited in the margin,[5] which have dealt with the question either in its precise or a kindred form.

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[2] "I have considered carefully the record and briefs in Cause No. 1062, U. S. A. v. 1000 Cans, Frozen Strawberries and rest in the conclusion that the Court does not have jurisdiction. Since Title 21, Sec. 341, U. S. C. provides that no definition or quality of fresh fruits or vegetables shall be established, I am of the opinion that even though the strawberries might have been adulterated when introduced into interstate commerce, yet no law was violated. The strawberries came to rest at a time when no law had been violated and not having been shipped in interstate commerce thereafter, I am of the opinion that no law was violated * * *."

[3] Findings of Fact:

"1. Between April 24 and May 2, 1950, raw strawberries were purchased by the claimant in Ponchatoula, La., and were packed in flats and shipped from Ponchatoula, La., to Gulfport, Miss., to the plant of the claimant, solely for the purpose of being processed, canned and frozen.

"2. The strawberries were sorted, washed, and mixed with sugar, processed for freezing and frozen, at Gulfport, Miss.

"3. Seizure was made of the strawberries after they had been sorted, washed and processed at Gulfport, Miss., and before they had been placed in Interstate Commerce.

"4. The seizure was made of strawberries which were not held for sale in interstate commerce and had not been shipped or introduced into interstate commerce, nor intended to be introduced in interstate commerce, until samples taken by claimant's chemist, examined, tested and certified to as complying with the Pure Food, Drug & Cosmetic Act.

"5. The processing of said strawberries was not complete at the time of the seizure and were not at that time intended to be introduced in interstate commerce or to be held for sale in interstate commerce.

"6. No tolerance or standard of quality had been promulgated by the Administrator for fresh strawberries or for frozen strawberries."

[4] Conclusions of Law:

"1. Title 21, Sec. 334, U. S. Code Ann. provides for jurisdiction and seizure. This Section provides that an article shall be liable to be proceeded against in Interstate Commerce or at any time thereafter if it is adulterated when introduced into or while in Interstate Commerce, or while held for sale after shipment in Interstate Commerce.

"2. Title 21, Sec. 341, United States Code Annotated provides that no definition of standard or identify or quality shall be established for fresh fruits or vegetables.

"3. The seizure herein was premature in that at said time, the Pure Food, Drug & Cosmetic Act had not been violated nor was it the intention of claimants to violate it.

"4. Since the frozen strawberries, the subject of the seizure, had not been introduced into Interstate Commerce, were not being held in Interstate Commerce and were not being held for sale after shipment in Interstate Commerce, this court is without jurisdiction and the cause should be dismissed for lack of jurisdiction."

[5] Hipolite Egg Co. v. U. S., 220 U. S. 45; In Re United States, 140 F (2) 19; Lee v. U. S., 187 U. S. 1005; Union Dairy Co. v. U. S., 250 Fed. 231; U. S. v. 40 Bbls. * * * Coca Cola, 215 Fed. 535; U. S. v. Sullivan, 332 U. S. 689; U. S. v. 36 Drums * * * Pop'n Oil, 164 F (2) 250; U. S. v. 24 Cans * * * Labeled Butter, 148 F (2) 365, cert, denied 325 U. S. 752; McAllister v. U. S., 5th Cir., (decided Feb. 1952).

"The order dismissing for want of jurisdiction was erroneously entered. It is REVERSED and the cause is REMANDED with directions to hear the libel on its merits."

On August 7, 1952, Allbrook Freezing & Cold Storage, Inc., having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be destroyed.

VEGETABLES

18784. Supplement to notice of judgment on foods, No. 18174. Misbranding of canned peas. U. S. v. 72 Cases * * *. (F. D. C. No. 32357. Sample No. 22411–L.)

As reported in the notice of judgment on foods, No. 18174, a default decree of condemnation and destruction was entered against the product on the ground that it was misbranded under Section 403 (h) (1) because it fell below the standard of quality for canned peas.

Subsequent to the entry of such decree, it was ascertained that the product, although misbranded, was fit for human consumption; and, accordingly, an amended decree was entered on February 13, 1952, ordering that the product be delivered to charitable institutions for consumption by the inmates.

18785. Adulteration of canned black-eyed peas. U. S. v. 70 Cases * * *. (F. D. C. No. 32653. Sample Nos. 13014–L, 14163–L.)

LIBEL FILED: February 12, 1952, District of Colorado.

ALLEGED SHIPMENT: On or about January 10, 1952, by the Tex-Plains Canning Co., from Lubbock, Tex.

PRODUCT: 70 cases, each containing 24 1-pound, 4-ounce cans, of black-eyed peas at Denver, Colo.

LABEL, IN PART: "Del Haven Fresh Shelled Blackeyed Peas."

NATURE OF CHARGE: Adulteration, Section 402 (b) (2), brine had been substituted in part for black-eyed peas. Examination disclosed that the article contained excess brine.

DISPOSITION: April 3, 1952. Default decree of condemnation. The court ordered that the product be delivered to charitable institutions.

18786. Adulteration of potatoes. U. S. v. 821 Sacks * * *. (F. D. C. No. 32288. Sample No. 27525–L.)

LIBEL FILED: December 27, 1951, Northern District of California.

ALLEGED SHIPMENT: On or about November 14 and 19, 1951, by August Brunkowski, from Smith, Nev.

PRODUCT: 821 100-pound sacks of potatoes at San Jose, Calif.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of parasitic worms.

DISPOSITION: January 8, 1952. Blase Bros. & Co., San Jose, Calif., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be released under bond for segregation and denaturing of the unfit portion, under the supervision of the Food and Drug Administration. Segregation operations resulted in the salvaging of 27,220 pounds of potatoes.